United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF AND APPENDIX

No. 76-4256 76-4256

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

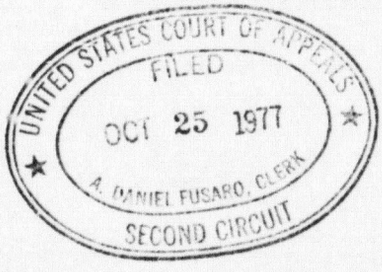
WALTER M. JANCZAK,
PETITIONER

v.

F. RAY MARSHALL,
SECRETARY OF LABOR,
RESPONDENT

Petition for Review of the Secretary of Labor's Determination Under Chapter 2, Title II of the Trade Act of 1974

BRIEF AND APPENDIX FOR THE PETITIONER



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BRIEF FOR THE PETITIONER

Statement of the Case

This case is before the Court on the petition of Walter Janczak, Chairman of the T.R.A. Committee of Local Union 2603, United Steelworkers of America, AFL-CIO (hereinafter "the Petitioner") requesting review of the Secretary of Labor's determination certifying in part and denying certification in part of eligibility to apply for worker adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974 as amended, 19 USC 2271 et seq. (hereinafter "the Act").

The Secretary of Labor, pursuant to a petition for certification of eligibility to apply for worker adjustment assistance, conducted an investigation (No. TA-W-884) of the Bethlehem Steel Company, Lackawanna, New York plant to determine the impact of imports on production and layoffs.

The Secretary of Labor issued a final determination stating that:

> "All workers at the Lackawanna plant of Bethlehem Steel Corporation, Woodlawn, New York, engaged in the production of carbon steel, structural shapes and piling in the Mills Structural and Slabbing Division who became totally or partially separated from employment on or after May 7, 1975 are eligible to apply for adjustment assistance under Title II, Chapter 2 of the Trade Act of 1974." (R. 202) 1/

The Secretary, however, further stated:

> "I further conclude that increases of imports like or directly competitive with steel ingots, booms and slabs produced in the plant's Steelmaking Division, carbon steel sheet and strip produced in the plant's Strip Mill Division, bar and steel rail produced in the plant's Specialty Products Shop did not contribute importantly to the total or partial separations of the workers at that plant." (R. 202)

Therefore, employees laid off from these departments are not certified as eligible to apply for workers assistance.

Upon receipt of this determination the United Steelworkers of Amereica, AFL-CIO requested review of the determination. (R. 253-254) Attention was focused upon the problem of the

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1/ The reference is to the Record filed by the Secretary of Labor in this case.

employee who worked in a "non-adversely affected department" and were bumped and laid off by fellow employees who had been laid off from an adversely affected department. (R. 256)

The Department of Labor upon review sustained the initial determination. (R. 272-273)

The Petitioner petitions this Court for review under Section 250 of the Act (19 USC 2322) of the Secretary of Labor's finding and seeks a modification of the findings to reflect the impact upon employees who are laid off ("bumped") from a non-adversely affected department by employees who are laid off from an adversely affected department and exercise their seniority rights.

Relevant Statutory Provisions

Section 222 (19 USC 2272) Group Eligibility Requirements

> The Secretary shall certify a group of workers as eligible to apply for adjustment assistance under this chapter if he determines--
>
> (1) that a significant number or proportion of workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

For purposes of paragraph (3) the term "contributed importantly" means a cause which is important but not necessarily more important than any other cause. (emphasis added)

Section 231 (19 USC 2291) Qualifying Requirements for Workers

Payment of a trade readjustment allowance shall be made to an adversely affected worker covered by a certification under subchapter A who files an application for such allowance for any week of unemployment which begins after the date specified in such certification pursuant to section 223(a) if the following conditions are met:

(1) Such workers lost total or partial separation before his application under this chapter occurred--

(A) on or after the date as specified in the certification under which he is covered, on which total or partial separation began or threatened to begin in the adversely affected employment, and

(B) before the expiration of the 2-year period beginning on the date on which the determination under section 223 was made, and

(C) before the termination date (if any) determined pursuant to section 223(d); and

(2) Such worker had, in the 52 weeks immediately preceding such total or partial separation, at least 26 weeks of employment at wages of $30 or more a week in adversely affected employment with a single firm or subdivision of a firm, or, if data with respect to weeks of employment are not available, equivalent amounts of employment computed under regulations prescribed by the Secretary.

Section 247 (19 USC 2319) Definitions for the Purposes of This Chapter

(1) The term "adversely affected employment" means employment in a firm or appropriate subdivision are eligible to apply for adjustment assistance under this chapter.

(2) The term "adversely affected worker" means an individual who, because of lack of work in adversely affected employment-

(A) has been totally or partially separated from such employment or

(B) has been totally separated from employment with the firm in a subdivision of which such adversely affected employment exists. (emphasis added)

Section 250 (19 USC 2322) Judicial Review

(a) A worker, group of workers, certified or recognized Union, or an authorized representative of such worker or group aggrieved by a final determination by the Secretary under the provisions of section 223 may within 60 days after notice of such determination, file a petition for review of such determination with the United States Court of Appeals for the circuit in which such worker or group is located or in the United States Court of Appeals for the District of Columbia Circuit...

(b) The finding of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceeding. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(c) The court shall have jurisdiction to affirm the action of the Secretary or to set it aside in whole or part. The judgement of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

The Regulations of the Secretary of Labor concerning certification of eligibility to apply and worker adjustment assistance are published in 29 CFR Parts 90 and 91.

Further procedures relating to worker adjustment assistance are published in Part C of MA Handbook No. 315, "Adjustment Assistance for Workers Under the Trade Act of 1974" a relevant portion of which is attached in the Appendix hereto.

Statement of Fact

In recent years many American industries particularly the steel industry have been under increasing competition from foreign manufacturers and imports. Often times this has meant large scale layoffs of workers. As recently as September and October of 1977, major steel producers have announced massive shutdowns citing imports as an important factor.

In 1976 in response to similar layoffs, employees at Bethlehem Steel Corporation who were laid off filed a petition seeking certification for eligibility to apply for workers adjustment assistance under the Act. The petitioners contended that imports were an important contributing factor for the layoffs and that they should be declared eligible for assistance under the Act.

The Secretary of Labor conducted an investigation and issued a determination that the Mills Structural and Slabbing Division were adversely affected departments, but that the Steelmaking Division, Strip Mill Division and Mills Bar Division, and Specialty Product Shop were not adversely affected departments.

This certification and denial of certification set up a strange set of circumstances which can best be illustrated

by relating the plight of one particular group of employees.

On or about August 2, 1975 a number of employees were laid off from the Structural Shipping Department. The Structural Shipping Department is within the adversely affected division under the determination and the employees were certified as eligible to apply for assistance. Shortly thereafter some of these laid off employees exercised their seniority rights under the collective bargaining agreement between Bethlehem Steel Corporation and the United Steelworkers of America, AFL-CIO, and bumped other employees. At least eight (8) of these employees (R. Parish, J. Stowell, C. Lipinski, D. Greco, E. Fisher, T. Hutchinson, S. Sobol, and E. Radmanski) (hereinafter "bumpers") bumped less senior employees in the 32" Rail Mill. The 32" Rail Mill was according to the determination a non-adversely affected department. On October 10, 1975 when the employees transferred in from the Structural Shipping Department they replaced eight less senior employees (A. Moran, T. T. Jasin, A. Harris, B. Scinta, D. Dilk, L. Bellagamba, M. Lewis, and E. Hamilton) (hereinafter "bumpees"). These employees were all women who had been working in the laborers classification. Because they were laid off from a department which was non-adversely affected according to the determination they were not certified as eligible to apply for assistance. Even though they were laid off because of increased imports, they did not receive assistance.

It is important to note that the bumpers had to exercise their seniority rights under the collective bargaining agreement to protect those seniority rights even though they were economically adversely affected by significant reduction in salary ($75-$100 per week).

It is the second group of employees with whom we are concerned. Even though one can trace their misfortune to imports, they do not fall within the certification of the Department of Labor and have received no benefits. Quite simply, the petitioner contends herein that the Secretary of Labor erred under the Act in so narrowly certifying employees as eligible.

Statement of the Issue

Is the Secretary of Labor's determination, which does not certify employees who are bumped from a "non adversely affected" department by employees who are laid off from an "adversely affected" department, supported by both substantial evidence and the Act and regulations promulgated under the Act?

Argument

THE SECRETARY OF LABOR'S DETERMINATION IS NOT SUPPORTED BY THE SUBSTANTIAL EVIDENCE AND IS NOT A RATIONAL APPLICATION OF THE ACT AND REGULATIONS.

The Act was enacted to accomplish several objectives among which was:

> "...to provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition, and to assist industries, firms, workers, and communities to adjust to changes in international trade flows."
> 19 USC 2102 (4)

To achieve this objective Congress in Chapter 2 of Title II of the Act (19 USC 2271 et. seq.) provided for the payment of workers adjustment assistance to workers who partially or totally suffered a loss of employment because of the impact of imports.

The Act prescribes two requirements which must be met for an employee to receive the assistance. First, the employee must fall within a certified group of employees (19 USC 2291). Second, the employee must be an adversely affected workers, (19 USC 2291) i.e. an employee who has been laid off from a firm in which employees have been certified as eligible to apply for benefits because of the impact of imports (19 USC 2319(1) and (2)).

Clearly the statute envisions and provides assistance for the employee who works in a department which is not directly affected by imports, but who is laid off because he is bumped by an employee who has been laid off from a department which is directly affected. The Act provides that:

> (2) The term "adversely affected worker" means an individual who, because of lack of work in adversely affected employment -
>
> * * *
>
> (B) has been totally separated from employment with the firm in a subdivision of which such adversely affected employment exists." (19 USC 2319(2)). (emphasis added)

It is also clear that the Secretary of Labor recognizes, at least by regulation, the scope of this definition. In the MA Handbook No. 315 published by the Secretary of Labor the Secretary states that:

> "All workers who are eligible to apply to TRA must meet the following separation requirements:
>
> a. The workers must have been
>
> * * *
>
> (2) totally separated from a non-adversely affected subdivision of a firm as a result of lack of work in an adversely affected subdivision of such firm. This type of separation occurs when an individual employed in a non-adversely affected subdivision of a firm is "bumped" as a direct result of the exercise of a seniority right to another job in the firm by a worker who, due to lack of work, has been separated from an adversely affected subdivision of such firm. If more than one bump is involved, all that is required is that there be sufficient evidence of the connection through each successive bump." (A. 1.) 2/

The regulations merely restate the Act stating that an:

> "Adversely affected worker" means an individual who because of lack of work in adversely affected employment:
>
> * * *
>
> (ii) Has been totally separated from employment with the firm in a subdivision of which such adversely affected employment exists." 29 CFR 91.3 (4)

2/ This reference is to the attached Appendix to this brief for the Petitioner.

A reading of the Act, the regulation and the M.A. Handbook leads to the logical conclusion that an employee who is bumped is eligible for, and entitled to assistance.

Those employees, however, who are in a non-adversely affected department, are confronted by a classic bureaucratic "Catch 22". The Act provides that to be eligible for assistance an employee be certified (19 USC 2291). The regulations provide that:

> "An individual covered by a certification or petition for certification under Section 90.16 of this title may apply at anytime to a State agency for a trade readjustment allowance. (29 CFR 91.6) (emphasis added)

and that:

> "To qualify for a trade readjustment allowance an individual must meet each of the following requirements.
>
> (a) Certification. The individual must be an adversely affected worker covered by a certification. (29 CFR 91.7) (emphasis added)

The M.A. Handbook simply states that:

> "To be eligible to apply for TRA, an applicant must be one of a group of workers covered under a certification of eligibility to apply." (A. 1) (emphasis added)

The bumpees are, however, not within the group of workers covered by the certification issued by the Secretary of Labor.

In the instant case we have a large industrial complex with many subdivisions producing a variety of steel products. The investigation by the Secretary of Labor revealed that only

certain products had been adversely affected by imports. The petitioner has no quarrel at this time with these specific findings. The Secretary of Labor then went on to certify as eligible to apply only those employees engaged in the production of those products. This limited certification clearly and callously ignores the realities of the rules of the plant and the Act and regulations.

The employees of Bethlehem Steel Corporation have, for a long period, enjoyed the benefits of collective bargaining. This has led to negotiated agreements which set forth the seniority rights of employees and the concurrent duties of employees. (R. 46-60) Both the United Steelworkers of America, AFL-CIO and Bethlehem have also entered into a Consent Decree with the Federal Government pursuant to this Court's ruling in U.S. v. Bethlehem Steel Corp., 446 F.2d 652 (CA 2 1971). (R. 61-66) As pointed out above in the Statement of Fact, employees are often required to exercise their rights to protect this seniority. The Consent Decree expands upon the seniority provisions of the collective bargaining agreement to assure that minority employees will not be disproportionately adversely affected by the operation of the seniority system.

In the plant bumping does not usually take place immediately. Some employees use some vacation time between their layoff and the subsequent bump. Other employees cannot exercise seniority rights, and bump for a period of six months after their layoff. When the rights are exercised, however, the employee

from the adversely affected department who is certified as eligible to apply may end up bumping (as the facts recited above demonstrate) an employee from a non-adversely affected department. Under the narrow ruling by the Secretary of Labor that employee is not certified as eligible to apply for assistance.

Both common sense and the Act tell us that an employee who produces a product not affected by imports, but who is bumped by an employee laid off from an adversely affected department is directly impacted by the imports. The determination, however, ignores this reality.

The clear error in the decision is that there was no examination of the operative collective bargaining agreement and the exercise of seniority rights. The certification should extend to all workers in non-adversely affected departments who are bumped by employees laid off from an adversely effected department.

It is important to note that the Act, the regulations, and the M.A. Handbook No. 315 do not require that the employee from an adversely affected department immediately bump the employee from the non-adversely affected department for the second employee to be eligible for assistance. Certainly, anyone with the least bit of knowledge of a simple industrial plant much less a complex industrial plant like Bethlehem knows that very rarely is an employee who is laid off <u>immediately</u> able to bump a less senior employee.

The relief requested by the petitioner is narrow.

The evidence and the facts clearly indicate that many more employees than those covered by the narrow certification have been effected by imports. The Act clearly mandates thatthose employees be provided with relief.

This petition does not request review of the Secretary of Labor's interpretation of the Act. The petitioner has no quarrel with that interpretation as it appears in the regulations and in the M.A. Handbook. The Secretary of Labor, however, has blatantly attempted to circumvent his own regulations by refusing to certify adversely affected employees in non-adversely affected departments.

The determination should be modified to certify those employees in non-adversely affected departments who are bumped by laid off employees from adversely affected departments as eligible to apply for assistance.

Conclusion

For the reasons set forth herein the relief requested should be granted and the petitioner respectfully requests this Court to direct the Secretary of Labor to certify "bumpees".

Respectfully submitted,

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benefit year ends and (1) if the claimant becomes entitled to UI in another State or (2) if the claimant does not become entitled to UI and his total or partial separation was in another State. (For instructions relating to transfer of claims refer to Chapter III, item 10.)

d. Application of State Law. During the period in which a State remains the paying State, the availability and disqualification provisions of the UI law of such State are applicable to TRA claims, except where such provisions are inconsistent with the provisions of the Trade Act of 1974.

7. Requirements for Eligibility to Apply for TRA. To be eligible to apply for TRA, an applicant must be one of a group of workers covered under a certification of eligibility to apply.

a. Limitation of Coverage Under a Certification Issued under the Trade Act of 1974. A certification issued by the Secretary under the 1974 Act does not cover any worker whose last total or partial separation from adversely affected employment occurred--

(1) More than one year before the date of the petition on which the certification was granted or

(2) Before October 3, 1974, except as provided in section 246(b) of the Act. (See Chapter XII, Transitional Provisions.)

8. Separation Requirements. All workers who are eligible to apply for TRA must meet the following separation requirements:

a. The worker must have been :

(1) totally or partially separated from adversely affected employment, or

— (2) totally separated from a non-adversely affected subdivision of a firm as a result of lack of work in an adversely affected subdivision of such firm. This type of separation occurs when an individual employed in a non-adversely affected subdivision of a firm is "bumped" as a direct result of the exercise of a seniority right to another job in the firm by a worker who, due to lack of work, has been separated from an adversely affected subdivision of such firm. If more than one bump is involved, all that is required is that there be sufficient evidence of the connection through each successive bump.

In addition to the requirements specified above, the worker's last total or partial separation prior to applying for TRA must have occurred--

(1) on or after the impact date specified in the certification under which the worker is covered, and

(2) before the expiration of the 2 year period beginning with the certification date, or before any earlier date the Secretary may specify for termination of the certification.

CERTIFICATE OF SERVICE

I hereby certify that copies of this brief were mailed this 24th day of October, 1977, to the Secretary of Labor, United States Department of Labor, Suite N-2101, 200 Constitution Avenue, N.W., Washington, D.C. 20210, respondent.

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